RECENT AMERICAN DECISIONS.

Supreme Court of Wisconsin.

STATE v. RYAN.

A statute providing that "any person charged * * * with being an inebriate, habitual or common drunkard, shall be arrested and brought before a Judge of a Court of Record for trial; * * * and if convicted * * * shall be sentenced to confinement in any inebriate or insane asylum in this State; * * * provided that some relative or friend * * * shall execute a bond conditioned that he will pay for the support of such inebriate * * * during his confinement," is in violation of the Constitution of the United States, Amend., Art. 14, § 1, which declares that no State shall "deprive any person of * * * liberty, * * * without due process of law;" nor "deny to any person within its jurisdiction the equal protection of the laws."

ORIGINAL proceeding by *certiorari*.

Austin, Runkel & Austin, for relator.
Jenkins, Winkler & Smith, for respondent.

February 28, 1888.

CASSODAY, J. The relator's right to a discharge depends upon the validity of chapter 194, Laws of 1887, under which he was arrested, tried, convicted, and sentenced to confinement for the period of two years. This Act is certainly anomalous. It is entitled "An Act relating to inebriates and habitual drunkards." The language of the Act, however, leaves it somewhat doubtful whether it should be regarded as penal or paternal. If it is to be regarded as penal, then its validity would seem to turn on widely different considerations than if it were paternal; and if it is to be regarded as paternal, then its validity would seem to turn upon widely different considerations than if it were penal. It reads: "Any person who shall be charged upon the complaint of another with being an inebriate, habitual or common drunkard, shall be arrested and brought before a Judge of a Court of Record for trial in the same manner that offenders may be arrested and brought to trial before a justice of the peace; and if he shall be convicted of being an inebriate, habitual or common drunkard, he shall be sentenced to imprisonment or confinement in any inebriate or insane asylum in this State, for a

period not exceeding two years, nor less than three months; provided, however, that before such sentence some relative or friend of such inebriate, habitual or common drunkard, shall execute a bond in the sum of $1000, with sufficient surety, to be approved by such Judge, to the State of Wisconsin, conditioned that he will pay for the support and treatment of such inebriate, habitual or common drunkard, during his imprisonment and confinement."

1. Is it penal? and, if so, is it a valid enactment? The words "charged," "arrested," "for trial," as "offenders," "convicted" and "sentenced to imprisonment or confinement" "for a period" to be definitely fixed, would seem to indicate an intention to make it a criminal offence to be "an inebriate, habitual or common drunkard," under any and all circumstances. The police powers of the State are certainly not only sweeping but potential when legitimately exercised. According to the more recent utterances of the Supreme Court of the United States, even the late Amendments to the Federal Constitution were not "designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity:" *Barbier* v. *Connolly*, 113 U. S. 31, per FIELD, J. This language was expressly sanctioned by Mr. Justice HARLAN, speaking for the Court, in the very recent case of *Mugler* v. *State*, 123 U. S. 663. In a recent work on the Limitations of Police Power, it is in effect asserted that there can be no lawful punishment of mere drunkenness, so long as it is concealed in strict privacy, without any exposure to or interference with the public or any individual: Tied. Lim. Police Power, 302. In other words, that strictly private and concealed vice of the individual cannot be lawfully made a public offence. The language of the Act in question would certainly admit of such conviction, without such exposure of publicity. But we are not called upon to determine whether the Act is invalid for that reason, unless we should conclude that the Act must be regarded as a penal statute—a question which will be presently determined. If to be "an inebriate,

habitual or common drunkard" was intended to be made a criminal offence by the Act, then it should have provided for or recognized the right of a "public trial by an impartial jury of the county or district wherein the offence" should be "committed: which county or district" should "have been previously ascertained by law:" section 7, art. 1, Const. Wis. The right to such "public trial" thus secured is manifestly a trial by jury in a Court of Law, having jurisdiction by virtue of law. The fact that no such trial is given, and no such jurisdiction is conferred or recognized in the Act in question constrains us to believe that it never was designed, and if it was, that it cannot be regarded as a valid penal statute. The Act in substance provides that any person so charged "shall be arrested and brought before a Judge of a Court of Record for trial," and if convicted and the requisite bond given, "he shall be sentenced," etc. We understand this to mean any Judge of any Court of Record in the State, even at chambers. True, this relator was so brought before the "Judge of the Municipal Court of the City and County of Milwaukee, being a Court of Record within said county." This is recited in the commitment. So it is recited therein that the complaint so charging the relator, was "addressed to" said Judge (naming and describing him) and that "upon said complaint," the said relator "was arrested and brought before the said" Judge (again naming and describing him) "for trial," and that "a trial of such charge" was "duly had before the said Judge and a jury, as demanded by the said" relator; and that "upon such trial, the said" relator "was convicted of being an inebriate, habitual and common drunkard;" and that upon the bond being given, "the said" Judge (again naming and describing him) "did, upon such conviction, * * * sentence the said" relator "to confinement * * * for the period of two years," etc. There is nothing in the commitment from which it can be inferred that such Municipal Court took or assumed to take jurisdiction of the matter so charged, nor that such trial was in or by said Court. On the contrary it appears throughout the commitment that the Judge of said Municipal Court acted as such Judge and only by reason of the authority supposed to be given to him as "a Judge of a Court of

Record" by virtue of said Act. The same language applies with equal force to a Judge of a County Court or a Circuit Court, or even of this Court. And yet we apprehend that no one would claim that the Legislature had power to authorize a member of this Court to take original jurisdiction in the trial of a criminal offence. Nor could the Legislature lawfully authorize the trial of such criminal offence before and by a Judge at chambers. And yet the Act gave to the Judge of the Municipal Court, sitting merely as "a Judge of a Court of Record," no other or greater powers than are therein given to any Judge of any other Court of Record, and hence, at most, not exceeding such powers as may be lawfully exercised by any Judge of a Court of Record at chambers. If the Legislature could lawfully authorize the trial of criminal offences by and before such Judge at chambers, then it could effectually leave the person so charged and convicted without any remedy by writ of error, which is only authorized to review final judgments in actions triable by jury as a matter of right: *Crocker* v. *State*, 60 Wis. 553. But the Constitution provides that in such actions "writs of error shall never be prohibited by law:" Id. section 21, art. I, Const. Wis. We must therefore conclude that the Act was not designed to be a penal statute, and that if it is one in fact, it must to that extent be regarded as inoperative.

2. Is the Act in question paternal? and if so, is it a valid enactment? Upon the argument it seemed to be conceded on both sides that the Act was designed wholly for the benefit and good of such unfortunate persons as might be liable to such charge. In fact the learned counsel in behalf of such detention likened the Act to the early statute of New York, which gave to the Court of Chancery custody and control of the person as well as the estate of an habitual drunkard: *In re Lynch*, 5 Paige, 120. It was there said that such powers of the Court of Chancery were by such statute "put precisely upon the same ground as its powers over the persons and estates of idiots and lunatics." In that case the person in custody had been "found to be incapable of conducting his own affairs by reason of habitual drunkenness." The Chancellor said: "Whenever the Court is satisfied she

has so far reformed that there is no danger of a relapse, the committee will be discharged and her estate will be restored to her." It was thereupon ordered in conformity to the "decisions, subject, however, to be modified by the Vice-Chancellor from time to time," as he might judge expedient, etc. Our general statute provides in effect that "when any person, by excessive drinking, shall be unable to attend to business, or shall be lost to self-control, and shall thereby greatly endanger his health, life, or property, or shall be an unsafe person to remain at large, or shall by gaming, idleness, or debauchery of any kind so spend, waste, or lessen his estate as to endanger his own or his family's support, or expose the town to charge or expense for such support," and the proper verified petition setting forth the facts and circumstances of the case be presented to and filed with the County Court; and if after due notice and "a full hearing, it shall appear to the Court proper under this section, such Court shall appoint a guardian of his person and estate with the powers and duties hereinafter specified. The County Court shall have power to authorize or direct the guardian of any such person named in this section to commit such person to any inebriate asylum * * * for a term not exceeding two years. Such person may be discharged at any time by order of the same Court:" Section 3978, Rev. Stat. A similar statute is in force in the city of New York, providing also for such discharge whenever the cause for such detention is removed: Knapp's Law relating to the P. I. I. & Habitual Drunkards, pp. 100–102. These statutes all go upon the theory of personal disability or want of self-control, which exposes the victim or others to danger or his estate to loss. These conditions create the necessity of intervention by the State through its authorized agency, as the needed physician—the Good Samaritan—the temporary guardian. The purpose of such guardianship is humane, beneficent and paternal, but the lawful right to its continuance is limited to the period of such disability or want of self-control. Since the only right of such confinement springs from the necessities resulting from such conditions, the removal of the conditions, and hence the necessities, when judicially ascertained, terminate the right: Tied. Lim. Police Powers,

114, 116, § 46, and cases there cited. But the Act in question goes upon an entirely different theory. According to it, "any person * * * being an inebriate, habitual or common drunkard" may be convicted thereof, and if "some relative or friend" gives the requisite bond, he must "be sentenced to imprisonment or confinement" for a period to be definitely fixed by the Judge within certain limits. Such conviction is not made dependent upon his inability to attend to business, nor to any want of self-control, nor upon his being dangerous to himself or others, but solely upon his "being an inebriate, habitual or common drunkard." Just what would make a person such is not very clearly defined. Manifestly it was intended that the drunkenness should be repeated to the extent of becoming habitual, but just how frequently it should occur, or the extent of the delirium or stupefaction, is left as a matter of fact to be determined by those who might differ widely in regard to it. Such habit might exist, and yet the victim be kind and generous-hearted, fully capable of attending to his business, gradually increasing his estate, tenderly providing for the wants of any dependant upon him, and without at all endangering the personal safety of himself or others. Such may be the condition of this relator for aught that appears in this record. True his condition may be so deplorable as to require confinement under the general statute mentioned or even such as to properly call for punishment. But, as we have seen, such is not the purpose of the Act in question. The relator has never been convicted of any penal offence known to the law, even before a Judge at chambers, much less in any Court of Law. The purpose of the Act is not to guard merely during disability or want of self-control, or danger of personal safety, but to imprison for a fixed period, without the commission of any penal offence or any trial in a Court of Law, merely by reason of the existence of the condition named, and to satisfy the Act and the "relative or friend" who kindly furnishes the requisite bond. Besides, the Act contemplates no restoration—no possibility of reformation within the time thus arbitrarily fixed. Not having been convicted of any offence known to the law, it would seem that he is beyond the reach of executive clem-

ency: Section 6, art. 5, Const. Wis. From what has been said it appears that the relator stands before the Court innocent of any offence known to the law, and yet committed "to imprisonment or confinement" for the period of two years, upon a commitment issued by a Judge at chambers, and without any authorized process from any Court of Law. If the Legislature may thus authorize imprisonment for two years without the commission of any offence made punishable by law, then it may do so for ten or twenty years. It is the question of power merely with which we are concerned. While the State should take compassionate charge of any who are dangerous to themselves or others, it is equally bound to protect the personal rights and liberties of every harmless and law-abiding citizen capable of taking care of himself, his family and his property, however weak and unfortunate he may be in other respects. So sacred are certain rights of the citizen that they are especially guarded by our National Constitution; which among other things declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws:" Section 1, art. 14, Amend. Const. U. S. In *Mugler* v. *Kansas*, *supra*, it is said by the Court: "Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals, or the public safety is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government." As indicated, the Act in question does not proceed upon the theory of protecting the public health, nor the public morals, nor the public safety, nor the personal safety of the victim, nor as a punishment for crime. On the contrary it proceeds upon the sole theory that the victim may be arrested, brought before a Judge of a Court of Record at chambers, and if found by him to be an "inebriate, habitual or common drunkard," he may, without the existence of any other fact or

condition, and without any trial in any Court of Law, imprison him for two years, without any provision for his release.

We are forced to the conclusion that the relator has been deprived of his liberty, without due process of law, and denied the equal protection of the law: *Yick Wo* v. *Hopkins*, 118 U. S. 356; *In re Ah Jow*, U. S. Circ. Ct. Dist. Cal., August 23, 1886, 29 Fed. Rep. 181; *In re Jacobs*, 98 N. Y. 98; *State* v. *Ray*, 63 N. H. 406; *Frazee's Case*, S. Ct. Mich., October 28, 1886. Under our Constitution the relator was "entitled to a certain remedy in the law" for such injury and wrong: Section 9, art. 1. This entitled him to a discharge. The order of the Court commissioner is reversed.

The common law has always guarded with great jealousy the personal liberty of the citizen. The Great Charter gave a guarantee that this right should not be invaded, except in accordance with the law of the land. The written constitutions of the various States likewise provide generally, that a citizen shall be free to pursue his own pleasure, except so far as his liberty may be restrained by the "law of the land," or "by due process of law." And the Constitution of the United States, by the fourteenth Amendment, has extended its control over the States, by declaring that no State shall "deprive any person of life, liberty, or property without due process of law." The phrases "due process of law" and "the law of the land" have been construed generally to mean the same thing. Perhaps as accurate and comprehensive a definition of this expression as can be given is the one used by Mr. Webster in the Dartmouth College Case. He says: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land." In determining, therefore, in a particular case, whether the citizen has been unjustly deprived of his liberty, the inquiry must ascertain whether the enactment under which he is tried is constitutional, and whether the mode of trial has been in accordance with the rules of the common law and our constitutional guarantees. And in the inquiry as to what is due process of law, the answer must depend upon principles and not upon mere matters of form.

Due process, so far as the method of trial where one is accused of a crime or misdemeanor is concerned, requires that the accused shall have the legal preliminary hearing after proper arrest; that he must be confronted with the witnesses against him; shall have assistance of counsel; shall have the question of his guilt determined by a jury; shall be entitled to a speedy and public trial; shall be convicted upon legal evidence; shall not be compelled to testify against himself. Where the law

has been changed so as to allow a prisoner to testify in his own behalf, a question has arisen as to what inference may be drawn from his refusal to so testify. In some States the statute provides that no legal inference shall be drawn against the criminal from this refusal. In some cases the courts have directed that no such inference can be drawn, while others have held that such act of the prisoner might be taken into consideration by the jury in coming to their conclusion as to his guilt or innocence. These principles have been repeated frequently in various cases: *Wynehamer* v. *People*, 12 N. Y. 378; *State* v. *Allen*, 2 McCord (S. C.) 55; *Sears* v. *Cottrell*, 5 Mich. 251; *Taylor* v. *Porter*, 4 Hill, 140; *Hoke* v. *Henderson*, 4 Dev. 1; *Janes* v. *Reynolds*, 2 Texas, 251; *Kinnard* v. *Louisiana*, 92 U. S. 480; *Murray* v. *Hoboken Co.*, 18 How. 272; *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (Mr. Webster's argument); *Brown* v. *Hummel*, 6 Penna. St. 86; *Norman* v. *Heist*, 5 W. & S. (Pa.) 171; *State* v. *Cleaves*, 59 Me. 298; *People* v. *Tyler*, 36 Cal. 522; Cooley's Const. Lim. 356.

The Constitution of the United States, in its fourteenth Amendment, does not create nor confer any new rights, but merely provides that no State shall illegally interfere with the rights already possessed, and that where a State, from local prejudice or other cause, has deprived any person of his rights under the law, redress may be obtained by resort to the Courts of the United States. In explaining the meaning of the phrase "due process of law," as contained in the fifth Amendment, the Supreme Court of the United States, in *Murray* v. *Hoboken Co.*, 18 How. 272, decide that this expression "does not necessarily imply a regular proceeding in a Court of justice or after the manner of such Court." The Court has, however, been frequently called upon to interpret this expression since the adoption of the fourteenth Amendment. They have, however, never given an exhaustive definition of it, but have simply said what it did or did not mean in the case before them. Justice MILLER, in his opinion in *Davidson* v. *New Orleans*, 96 U. S. 97, in justification of this course, says: "It must be confessed, however, that the constitutional meaning or value of the phrase, 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States. * * * It would seem from the character of many of the cases before us that the clause under consideration is looked upon as a means of bringing to the test, of the decisions of this Court, the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other Court to any part of the fundamental law. But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclu-

sion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

Somewhat different considerations will influence the Court in the interpretation of the clause, "without due process," when they are deciding questions of United States law, as enforced in the United States Courts, or when, on the other hand, they are deciding whether a State has offended against the fourteenth Amendment. An enactment, which might violate some of the general principles of constitutional law which the Court could enforce, in the former case, might not, if passed by a State Legislature, deprive a person of due process, within the meaning of the fourteenth Amendment. A State has a right, within certain limits, of altering the mode of judicial proceeding without violating this provision. The principle is expressed by the Court, in *Davidson* v. *New Orleans* (supra), in this language: "It is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issue affecting it, he has, by the laws of the State, a fair trial in a Court of justice according to the modes of proceeding applicable to such a case." In this case the State had made an assessment upon real estate in New Orleans to pay the expense of draining swamps in that city. It was held that the requirement of due process of law had been complied with when the State statute had provided that such assessment, before it became effectual, must be submitted to a Court of justice, with notice to the owners of the property, all of whom had the right to appear and contest the assessment.

An erroneous decision by a State Court is not such deprivation of property without due process as will support an appeal to the United States Court: *Arrowsmith* v. *Harmoning, Adm'r, etc.*, 118 U. S. 194. This case holds that a State has performed its constitutional duty in this regard when it enacts laws for the government of its Courts, while exercising their respective jurisdictions, which, if followed, will furnish parties with the constitutional guarantees of life, liberty, and property.

A State may provide a different mode of trial than by jury, in a civil case: *Walker* v. *Sauvinet*, 92 U. S. 90.

Most of the State enactments, which bear upon the personal liberty of the citizen, and which have come before the Supreme Court of the United States for a decision of their constitutionality, have grown out of the exercise of the police power of the State. Blackstone, Lib. 4, page 162, defines the police power to include "the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." Cooley says, "The police of a State, in a comprehensive sense, embraces its whole system of internal regulations, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish, for the intercourse of a citizen with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as it is reasonably consistent with a like enjoyment of rights by others." Numerous cases have presented to the United States Supreme Court for decision the question how far the States

have violated the fourteenth Amendment by the exercise of their police power. This Court has frequently announced that the Amendment did not deprive a State of the exercise of this power. The State has the same right to the lawful exercise of this power that it ever had. The United States Court will, however, see that the State enactment is a fair and legal exercise of this power and not a mere pretence for infringing the liberty of the citizen.

In *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, it was held that an appropriation, by Congress, of money to be expended in the improvement of a navigable river is no assumption of police power over it; nor does the conferring of the privileges of a port of entry come in conflict with the police powers of a State which have been exercised in bridging its own navigable rivers below such port.

In the *Slaughter-house Cases*, 16 Wall. 36, the Court decided that the State had the right to grant to a corporation, formed under the State's authority, the exclusive privilege of maintaining a slaughter-house and slaughtering cattle therein. That in doing this, the Commonwealth was properly exercising its police power, and such exercise was no infringement of the provisions of the fourteenth Amendment. And in *Munn* v. *Illinois*, 94 U. S. 113, the right of the State to prescribe regulations for the carrying on of the business of warehouses, exclusively within her limits, was affirmed. And it was held that among the powers inherent in every sovereignty was that of regulating the conduct of citizens towards each other, and the manner in which each shall use his own property; that an owner of property who devotes it to a public use grants in effect to the public an interest in such use, and must, therefore, to that extent submit to the public's control.

The right of a State to legislate in behalf of the public health, economy and morals has been affirmed in the most emphatic manner. In one of the most recent cases, *Powell* v. *Pennsylvania*, 127 U. S. 678, it is declared "that the prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk; or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell the same, as an article of food, is a lawful exercise by the State of the power to protect by police regulations the public health." And further, "whether the manufacture of such article is, or may be conducted in such a way, or with such skill or secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health, as to require, for the protection of the people, the entire suppression of the business, rather than its regulation, in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine."

In *Mugler* v. *Kansas*, 123 U. S. 623, an exercise of the police power of the State, even more extreme than that of the preceding case, was justified. The State had prohibited the manufacture and sale of liquor for general use, as a beverage; and had declared that any place kept and maintained for the illegal manufacture and sale of liquor should be deemed a common

nuisance and be abated. The Supreme Court of the United States upheld this law. They held that such prohibition was fairly adapted to protect the community against the evils of intemperance: that forbidding the use of property for purposes of manufacture, etc., of liquor was not a taking for the public benefit, and the destruction of such property, in the abatement of a nuisance, does not deprive the owner of it without due process of law. The principles upon which the Supreme Court will act in determining whether a State has improperly exercised her police power are well expressed by Justice HARLAN, who delivered the opinion. He says: "It does not follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the Courts must obey the Constitution, rather than the law-making department of government, and must, upon their own responsibility, determine whether in any particular case, these limits have been passed. The Courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge and thereby give effect to the Constitution. They (the Courts) have nothing to do with the mere policy of legislation. And so, if, in the judgment of the Legislature, the manufacture of intoxicating liquors, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question." See, also, *Barbier* v. *Connolly*, 113 U. S. 27.

A State has the right to regulate its mode of criminal procedure within proper limits, and by doing so, will not infringe the fourteenth Amendment. In *Hurtado* v. *California*, 110 U. S. 516, it was held that "due process of law" in this amendment did not require an indictment by a grand jury in a prosecution by a State for murder. The State statute provided for a hearing by a magistrate, with the right of the accused to be present with counsel and to cross-examine; and upon such hearing, he could be held for trial by a jury. The Supreme Court decided that an indictment or presentment by a grand jury was not, under the common law of England, essential to "due process of law." In *Spies* v. *Illinois*, 123 U. S. 131; s. c. 27 AMERICAN LAW REGISTER, 23, the State law, upon the subject of the selection of jurors, contained the following provision: "In the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law

and the evidence, and the Court shall be satisfied of the truth of such statement." In this case the State Court ruled that, under this statute, "it is not a test question whether the juror will have the opinion which he has formed from the newspapers changed by the evidence, but whether his verdict will be based only upon the account which may here be given by witnesses under oath." One of the defendants offered himself as a witness, and then objected to the extent of the cross-examination to which he was subjected. An application was made to the Supreme Court of the United States for a writ of error on account of these alleged irregularities in the trial. This Court decided that the interpretation put upon this statute by the State Court did not deprive the accused of a trial by an impartial jury, and, therefore, they would not be, by conviction, deprived of their lives without due process of law. And further, that the extent of the cross-examination of a defendant, whether it must be confined to matters pertinent to his testimony in chief or may be extended to matters in issue, was not a Federal question.

One of the purposes of the fourteenth Amendment, in its application to criminal trials, is to see that no unjust discrimination is made between citizens. As the Court say in *United States* v. *Cruikshank et al.*, 92 U. S. 542, this amendment "prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty." *Yick Wo* v. *Hopkins*, 118 U. S. 356, brought before the United States Supreme Court, the construction of an ordinance of the city of San Francisco. This provided that a laundry must be of brick or stone, unless the consent of the supervisors to a different construction was obtained; that without the consent of this board, no scaffolding could be erected on the roof of any building; the violation of this ordinance was made a misdemeanor. It was admitted upon the record that only Chinese had been arrested for a violation of this regulation, while others had not been molested; and that the petitions of Chinese for the permission of the supervisors had been uniformly refused, while those of other persons had been granted. The State Supreme Court held that the action of the supervisors under the ordinance was justifiable. The Supreme Court of the United States, however, decided that they had the right to put their own construction upon the ordinance; that the United States Constitution had been violated because the city regulation conferred upon the authorities "arbitrary power, at their own will and without regard to discretion in the legal sense, to give or withhold consent as to persons or places, without regard to the competency of the persons, or the propriety of the place selected." And further, "that the guarantees of protection, in the fourteenth Amendment, extended to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color, or nationality."

In the above case of *State* v. *Ryan*, the judge of the State Court by decid-

ing that the prisoner had been found guilty without due process of law and in violation of the fourteenth Amendment of the Constitution of the United States, and by ordering his discharge, prevented an extremely interesting question of constitutional law, as it affects the right of personal liberty, from coming before the United States Court for decision. The Wisconsin statute is certainly somewhat obscure. The learned Court seems to be in great doubt as to the nature of the Act, and gravely inform us that "if it be regarded as penal, then its validity would seem to turn upon widely different considerations than if it were paternal; and if it is to be regarded as paternal, then its validity would seem to turn upon widely different considerations than if it were penal." To become gloriously drunk in strict privacy has, heretofore, been regarded as one of the natural rights of the citizen, which is beyond the public control; while intoxication which leads to breach of the peace or infringement of the rights of others may place its victim within the power of the law. And commitment to an inebriate asylum has been held to infringe the right of personal liberty where it has been done upon *ex parte* affidavits, and without affording a chance to be heard and a proper examination before a judge or officer and a jury; *In re Adrian Janes*, 30 How. Pr. R. 446. The act in question would seem to refer not to private drunkenness. It provides that a person charged with habitual or common drunkenness shall be tried. An habitual or common drunkard is known to be such to the community. It further provides for a trial before a Judge of a Court of Record, and the mode of trial is defined to be the same as that before a justice of the peace; and, from the statement, in the opinion of the Court of what was upon the record, the trial would seem to have been before a jury. The question, therefore, would seem to be whether the State has the right, under its police power, either to punish or commit for reformation, a person who has been, after full investigation, found to be a common drunkard. It has been decided that a State may, in the fair exercise of its police power, make it an offence for a citizen to manufacture liquor for his own use, if the public by their Legislature say that such conduct is prejudicial to the good morals of the community: *Mugler* v. *Kansas*, *supra*. There are very good reasons for holding that the example of drunkenness may also be very injurious to the public morals.

WM. H. BURNETT.

Philadelphia.

Court of Appeals of Maryland.

HUNCKEL *v.* VONEIFF.

A witness is privileged to cast a grossly slanderous reflection upon a party to the controversy, in response to a question asked during the examination of the witness, and which might have been answered without making such reflection. An action for slander or libel will not lie for such answer.

APPEAL by plaintiffs, from a judgment of the Superior Court of Baltimore County, sustaining a demurrer to the *narr.* in an action of libel.

Mr. *William S. Bryan, Jr.*, with Messrs. *Isidor Rayner* and *George R. Gaither, Jr.*, for appellants.

Mr. *Edwin Higgins*, for appellees.

MILLER, J. (June 13, 1888.) This is an action of libel or slander against a witness in an equity cause, whose testimony was written down by the examiner, returned to the Court, and read at the hearing before the Judge. The alleged libellous or slanderous statements are contained in the testimony thus taken. There was a demurrer to each of the two counts in the declaration, which the Court sustained and thereupon gave judgment for the defendants. From that judgment this appeal is taken.

In the able arguments of counsel the whole field of the law on the question of privilege has been explored, and we believe all the decisions, as well as the opinions and *dicta* of eminent Judges, have been cited and pressed upon our attention. It would be a tedious task to review them in detail, and a hopeless one to attempt to reconcile them. The question is a new one in this State. No precedent for such an action has been found in our reports or judicial records, and we believe this is the first attempt to bring one since a Court of Justice was first established in the Colony of Maryland, a period of more than two centuries. This fact, while it may not be conclusive against the right to maintain the action, certainly leaves us free to follow and adopt those authorities which state the law in accordance with what, in our judgment, the administration of justice and a sound public policy demand.

The case now before us is not that of an advocate but of a witness, and in our opinion it is of the greatest importance to the administration of justice that witnesses should go upon the stand with their minds absolutely free from apprehension that they may subject themselves to an action of slander for what they may say while giving their testimony. Mr. Townshend, in his book on Slander and Libel, well says: "The due administration of justice requires that a witness should speak according to his belief, the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness, that

except for any wilfully false statement (which is perjury), no matter that his testimony may in fact be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him. It is not simply a matter between individuals; it concerns the administration of justice. The witness speaks in the hearing and under the control of the Court; is compelled to speak, with no right to decide what is immaterial; and he should not be subject to the possibility of an action for his words:" Townshend, Slander & L. § 223.

But there is more substantial authority for the absolute character of the privilege. In the standard work of Starkie on Slander, it is laid down as the result of the English decisions, that "witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy, in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony:" 1 Starkie, Slander, 242.

This statement of the law has been frequently quoted with approval by the English Courts, and in some instances by Courts and text-writers in this country: *Terry* v. *Fellows*, 21 La. Ann. 375 (1869).

In support of the absolute character of the privilege, a long list of English decisions, ancient and modern, has been cited. Without referring to the earlier ones, we mention some of those decided in more recent times, which have special reference to the case of parties and witnesses: *Revis* v. *Smith*, 86 Eng. C. Law, 126 (1856); *Henderson* v. *Broomhead*, 4 Hurlst. & N. 568 (1859); *Kennedy* v. *Hilliard*, 10 Irish C. L. 195 (1860); *Dawkins* v. *Rokeby*, 4 Fost. & F. 806 (1866); *Dawkins* v. *Rokeby*, L. R. 18 Q. B. 255 (1873); s. c. on appeal in the House of Lords, L. R. 7 H. L. Eng. & Irish App. 744 (1875).

In these cases WILLES, COLERIDGE, C. J., COCKBURN, C. J., BLACKBURN, KELLY, C. B., CRESSWELL, Lord CAIRNS, and other eminent jurists, have again and again expressed the opinion that the privilege of a witness should be absolute, have

pointed out the great benefit of such privilege to the administration of justice, and have deprecated in strong terms the evil consequences they thought would ensue if witnesses were placed under any intimidation, or the fear of being involved in litigation by reason of what they might say when under examination. In *Dawkins* v. *Rokeby*, the Judges were called in, and gave unanimously an answer to the question put to them by the House of Lords, in which they say: "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If that were all, evidence of express malice would remove this ground. But the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action, on an allegation, whether true or false, that they acted from malice. The authorities as regards witnesses in the ordinary Courts of Justice are numerous and uniform."

After this decision, the case of *Seaman* v. *Netherclift* arose, which was tried before C. J. COLERIDGE, at *nisi prius*, and afterwards decided by him and BRETT, J., in L. R. 1 C. P. Div. 540; and subsequently by the Court of Appeals in L. R. 2 C. P. Div. 53 (1876). The Judges who heard the case on appeal, were COCKBURN, C. J., BRAMWELL, A. J., and AMPHLETT, A. J., and they disposed of it at once. COCKBURN, C. J., said: "If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness, is established by a long series of cases, the last of which is *Dawkins* v. *Rokeby*, after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness, with reference to the inquiry" (the inquiry

referred to being a military court of inquiry instituted to investigate the conduct of an officer) "is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness, or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law, that what a witness states altogether out of the character and sphere of a witness, or what he may say *dehors* the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case (*Trottman* v. *Dunn*, 4 Camp. 211) before Lord ELLENBOROUGH. Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked, 'Were you at York on a certain day?' and he were to answer, 'Yes, and A. B. picked my pocket there;' it certainly might well be said in such a case that the statement was altogether *dehors* the character of witness, and hot within the privilege."

So, in speaking upon the same subject, BRAMWELL, A. J., says: "Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim, 'That man picked my pocket;' I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he may say in the witness-box, wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything that a witness said, as a witness, should be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words 'having reference to the inquiry' ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness

might be indicted for perjury, or the exclusion of which by the Judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness."

AMPHLETT, A. J., on the same subject, says: "How it would have been if this statement had been volunteered by the defendant, without it being necessary or in any way arising from questions he had been asked, we need not express any opinion. In such a case it may be that the words would not have been spoken in his office of a witness. I must by no means be taken as expressing an opinion that in such a case the witness would not be protected. I can see many reasons why a witness should be absolutely protected from anything he said in the witness-box. If he did voluntarily make a scandalous attack while giving evidence he would be guilty of a gross contempt of Court, and might be committed to prison by the presiding Judge; or if he were before an inferior tribunal, and he persevered in his scandalous statements, he might be liable to an indictment for obstructing the course of justice."

Much also was said as to the privilege of a witness in the still more recent case of *Munster* v. *Lamb*, in the Court of Appeals, L. R. 11 Q. B. Div. 588 (1883); 23 AMERICAN LAW REGISTER, 12; and we feel ourselves at liberty to adopt, if we choose, what was said in that case on that subject. The Judges, BRETT and FRY, there again affirm the absolute character of this privilege in the broadest terms. "Why," says FRY, L. J., "should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against Judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the

adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting *bona fide*, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions;" and he refers to the fact that Courts of Justice have control over all proceedings before them, and have ample powers to check improper conduct on the part of witnesses as well as solicitors and counsel.

Such are the English decisions. As to authority on the same subject in this country we have already referred to what has been said by Mr. Townshend, in his book on Slander and Libel, and we have the authority of Judge COOLEY to the effect that "among the cases which are so absolutely privileged on reasons of public policy that no inquiry into motives is permitted in an action for slander or libel, is that of a witness giving evidence in the course of judicial proceedings. It is familiar law that no action will lie against him at the suit of a party aggrieved by his false testimony, even though malice be charged;" and for this a number of authorities from different States are cited: Cooley, Const. Lim. 545.

Again: Mr. Wait seems to adopt the English cases as laying down the true rule: 7 Wait, Act. & Def. 438.

A different view as to the extent of this privilege has been taken by the Courts of many of the States, and it may be conceded that the weight of authority in this country is in favor of a much greater restriction upon the privilege than is sanctioned by the English decisions. But we are not controlled by any decision of our own Courts, and are at liberty to settle the law for this State according to our best judgment. After a most careful consideration of the subject, we are convinced that the privilege of a witness should be as absolute as it has been decided to be by the English authorities we have cited, and we accordingly adopt the law on this subject as they have laid it down.

It remains to apply this law to the case before us. The declaration does not state definitely what the controversy or matter of inquiry in the equity case of *Manning* v. *Voneiff* actually was. Enough is stated, however, to warrant the inference that the female plaintiff was a party to that suit, or was preferring a claim in some capacity to the estate, or some part of it, of a Mr. Plitt, deceased, and that the witness or her husband was resisting that claim. The defendant was examined as a witness in that case, and so far as her testimony is set out in the declaration, it appears she was first asked if she remembered quite distinctly the day on which her husband told her he was copying certain deeds at Mr. Plitt's request. To this she replied that the saw her husband copying some papers; that he had a file of papers, copying them, and she being inquisitive asked him what he was writing, and he said he was copying some deeds Mr. Plitt asked him to copy. She was then asked, "Was that the same day on which the magistrate came to see Mr. Plitt?" To this she replied, "No, I don't think so." She was then asked, "Well, how many days about intervened?" To this she replied, "Not knowing that a mistress or woman of Mr. Plitt's would step in to claim the lawful wife's property, I did not keep an account of the date that way; if I would have, I would have noticed the date and all those little particular incidents to save Mrs. Plitt from much heartache and trouble and cause of her death." This is the libel or slander complained of. Now it is true she could have answered the question by simply saying she "did not remember." It is also true that the imputation thus cast upon the plaintiff was grossly slanderous. She may have made it from malice, knowing at the same time that it was false, and from the averments of the declaration which the demurrer admits we must so take it. Still it was the excuse she chose to give as to not remembering the date about which she had been pressed by this and two previous questions. It is, as we consider it, nothing more than a reflection cast upon a party to the controversy in answer to a question which could have been answered without making such reflection. The answer might have been expunged from the record and the witness punished for mak-

ing it, but it is quite impossible to say that she did not make it in her character as witness, or that it is at all like the examples put by the Judges in *Seaman* v. *Netherclift*, as being outside of the privilege.

Judgment affirmed.

ROBINSON, J. (dissenting). The absolute and unqualified privilege of a witness as laid down in this case, is, in my opinion, a departure from the well-settled law on the subject. I agree that a witness is absolutely protected as to everything said by him, having relation or reference to the subject-matter of inquiry before the Court. But if he takes advantage of his position as a witness to assail wantonly the character of another and to utter maliciously what he knows to be false, in regard to a matter that has no relation or reference to the matter of inquiry, he is, in my opinion, both on principle and authority, liable in an action of slander. I must, therefore, enter my dissent to the judgment in this case.

BRYAN, J., also dissents.

The question decided by the above case, and to be discussed in this note, may be stated thus: Is a witness *absolutely* protected from suit for slanderous charges made by him in the witness-box, or does his privilege extend only to those statements which are pertinent to the proceeding in which he is testifying?

All authorities and writers agree in giving to a witness a certain privilege in his character as witness; and the grounds on which this privilege rests are most reasonable and satisfactory. We need not repeat here what is said on this point in the case above nor in the various text-books and decisions. All unite in the doctrine that public policy and the due administration of justice require that witnesses in judicial proceedings should be free to speak out in regard to the matters in controversy, without fear of being in any way liable to suit for slander. All agree, too, that no matter how false and no matter how malicious such statements of a witness may be, he is nevertheless protected by his privilege. It is only in regard to the question of relevancy that the decisions are not harmonious.

From the cases quoted in the opinion above, it is obvious that the English judges have laid down the rule that a witness is absolutely privileged in what he says in the course of his examination. "Neither is that privilege affected by the relevancy of what he says," are the words of Lord COCKBURN in *Seaman* v. *Netherclift*, 2 C. P. D. 53 (1876), and the expressions of the other Judges in the case are to the same effect. The instances put by Lords COCKBURN and BRAMWELL, in which the witness might be liable, are not understood to mean that *relevancy* is material, but are given as examples of words spoken outside of the character of witness.

It is, however, to be remarked that

the English Courts have never been called upon to decide a case in which the words complained of were not pertinent to the cause in which they were spoken. In *Seaman* v. *Netherclift*, from which the principal case makes full quotations, "the statements complained of were strictly pertinent to the matter in issue." The possibility of a different opinion, as to the effect of irrelevant testimony, is suggested by Lord BRAMWELL; the counsel for the defendant "said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. * * * I can scarcely think a witness would be protected in anything he might say in the witness-box, wantonly and without reference to the inquiry;" and the Judge remarks that the words "having reference to the inquiry" ought to have a very wide and comprehensive application, and ought to extend to what a witness might naturally and reasonably say when giving evidence. But, notwithstanding these qualifying observations, there is no reason for doubting that the judgment of the Court means that the privilege of a witness is absolute and that relevancy or irrelevancy is not to be considered.

Henderson v. *Broomhead*, 4 H. & N. 569 (1859), is another case in which the liability of witnesses has been discussed. There an action was brought against a person who had made a scandalous, false, and malicious affidavit, in a cause pending in Court, for the purpose of defaming a person not a party to the cause. In the judgment in favor of the defendant, it is stated very broadly that "no action will lie for words spoken or written in the course of any judicial proceeding. By universal assent it appears that in this county no such action lies." In this case, however, as in *Seaman* v. *Netherclift*, the words were capable of being held relevant. "I can easily see how they might be relevant," says ERLE, J.; so that the judgment of the Court was not pronounced upon the legal effect of irrelevant testimony.

As stated in the principal case, the question was also considered in *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255 (1873). The defendant was sued for slander uttered by him while a witness before a military Court, and it was in effect held that as the defamatory words had been spoken by the defendant while a witness before a military Court, and had reference to the subject-matter before that Court, they were privileged, and whether they were spoken falsely and maliciously were questions altogether immaterial. KELLY, C. B., in giving judgment for the defendant, said: "No action lies against a party or witnesses for anything said or done, though falsely or maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a Court of justice;" and the observation of Lord MANSFIELD is quoted, that "neither party, witnesses, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office." On appeal to the House of Lords (L. R. 7 H. L. 744 (1875), this judgment was affirmed, and, as quoted in the principal case, it was said that "a long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of justice."

The latest English case upon the subject is *Munster* v. *Lamb*, 11 Q. B. Div. 588 (1883), 23 AMERICAN LAW

REGISTER, 12. The action was against a solicitor for slanderous words spoken while acting as an advocate. In rendering judgment, BRETT, M. R., took occasion to discuss the liability of witnesses for slander, and his observations are as follows: "With regard to witnesses the general conclusion is, that all witnesses speaking with reference to the matter which is before the Court, whether what they say is relevant or irrelevant, whether what they say is malicious or not, are exempt from liability to any action in respect of what they state. It was at one time suggested that although witnesses could not be held liable to an action upon the case for defamation, nevertheless they might be held liable in another and different form of action on the case, namely, an action analogous to an action for malicious prosecution, in which it would be alleged that the statement complained of was false, to the knowledge of the witness, and was made maliciously and without probable cause;" but such an action cannot, according to the authorities, be maintained.

We now come to the case of *Kennedy* v. *Hilliard*, 10 Ir. C. L. Rep. 195 (1860), in which is to be found the most careful examination of the question that has come from the Courts of the British empire. The action was for libel, for false swearing in a judicial trial. In the course of a long opinion, and after a review of the English cases and a statement of the reasons on which they are based, PIGOT, C. B., says: "In my judgment, the immunity of a party from an action for defamation for what is said or written or sworn by him on his own behalf in a judicial proceeding, attaches whether what he states be or be not material. The reason of the rule of law which protects him applies to his statement on his own behalf, wholly irrespective of their immateriality. The difficulty is often great, to one skilled in the law, of determining upon the questions of the irrelevancy or immateriality of statements or of evidence. If a witness shall be bound to determine first what are the exact questions at issue in the cause, and next what is the exact line at which statements or evidence shall be material, and to determine this at the peril of an action for defamation if he be wrong, if his word be defamatory, the protection which the law professes to give him would be nearly nugatory. That purpose is to give him the courage to resort as a party to the legal tribunals for justice or as a witness to give his evidence before those tribunals, undeterred by the fear of a prosecution for libel. It is impossible that he can be free from that fear, if his immunity must depend upon his not mistaking what is not material for what is, and upon his rightly distinguishing what is from what is not libel or actionable slander." In the same case, GREEN, B., after reviewing the cases in which the privilege of counsel in argument is held to be restricted to what is relevant to the matter before the Court, says: "Assuming the inquiry as to relevancy to be open and material in the case of language used by a counsel, I cannot find any satisfactory authority for the position that it is so in the case of a party to a proceeding or a witness. Considering the foundation of the rule, which is, that public policy requires that a man shall not be deterred by the fear of an action from instituting a legal proceeding or giving full and free testimony for the advancement of justice, I do not see how the protection intended to be afforded to such a person can have its full and effectual operation, if he is, at his peril, to see to the relevancy and per-

tinence of his statement. A counsel being *legis peritus* and retained for a client and being at liberty to exercise his own discretion, may possibly be differently circumstanced. It may not be unreasonable to expect from him a greater degree of circumspection."

Turning now to the American decisions, we find that the principal case, *Hunckel* v. *Voneiff*, is the only one in this country which adopts in full the law as laid down in England. In Louisiana, indeed, it was said in *Terry* v. *Fellows*, 21 La. An. 375 (1869), that "the administration of justice requires the testimony of witnesses to be unrestrained by liability to vexatious litigation. The words they utter are protected by the occasion and cannot be the foundation of an action for slander." This case is cited in *Hunckel* v. *Voneiff* as an authority for the absolute privilege of a witness, but its citation for that purpose is misleading since it was modified in the subsequent case of *Burke* v. *Ryan*, 36 La. An. 951 (1884), by "this qualification, that statements thus made in the course of an action, must be pertinent and material to the issue."

The leading case in this country upon privilege in judicial proceedings is without doubt *Hoar* v. *Wood*, 3 Metc. 193 (1841). The action was against a person who conducted a prosecution before a justice of the peace, and the question of the privilege of a witness was not directly involved. But the reasoning of SHAW, C. J., in that case has been applied in later Massachusetts cases to the privilege of witnesses, so that the observations of the learned judge are properly considered. "We take the rule to be well settled by the authorities," says the Court, "that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. The question therefore in such cases is whether the words were spoken in the course of judicial proceedings and whether they were relevant and pertinent to the cause or subject of inquiry. And in determining what is pertinent much latitude must be allowed to the judgment and discretion of those who are interested in the conduct of a case in Court, and a much larger allowance made for the ardent and excited feelings with which a party or counsel may become animated. * * * Still this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions either against a party, witness, or third persons, which have no relation to the cause or subject matter of the inquiry."

In *Rice* v. *Coolidge*, 121 Mass. 393 (1876), the privilege of a witness was more directly considered. "It seems to be settled by the English authorities," says the Court, "that judges, counsel, parties, and witnesses are absolutely exempted from liability for defamatory words published in the course of judicial proceedings. The same doctrine is generally held in the American Courts, with the qualification as to parties, counsel, and witnesses, that in order to be privileged, the statements made in the course of an action must be pertinent and material to the case;" and the remarks of SHAW, C. J., given above, were quoted and approved. And in *McLaughlin* v. *Cowley*, 127 Mass. 316 (1879), after stating the law as announced in *Hoar* v. *Wood*, the Court says: "The quali-

fication of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice may not be abused as a cloak from beneath which to gratify private malice."

In Vermont, the question has been considered in *Mower* v. *Watson*, 11 Vt. 536 (1839), in a careful opinion by Judge REDFIELD; and the conclusion is that an action against a witness for slander is maintainable, if the false statements were irrelevant and malicious. The defendant was sued for slander spoken while a party to a case on trial. The Court says: "If any one considers himself aggrieved, in order to sustain an action for slander he must show that the words spoken were not pertinent to the matter in progress, and with a view to defame him. So that if the words spoken were pertinent to the matter in issue, the party and counsel may claim full immunity from an action of slander, however malicious might have been his motive in speaking them. The plaintiff in order to maintain his action must prove, first, that the words spoken were not pertinent to matter then in hand, and, second, that they were not spoken *bona fide*."

White v. *Carroll*, 42 N. Y. 161 (1870), is hardly worthy of the attention sometimes given to it. W., an allopathic physician, while testifying as a witness, went out of his way to call C., a homœopathic physician, a "quack." In sustaining a judgment for the plaintiff the Court says: "If the defendant, in testifying as a witness, and as such entitled to the protection of law, in using the words proved, was actuated by malice; if he used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him, and he became amenable to the consequences of uttering the slander." The opinion in this case is very offhand, and contains no discussion of principles nor citation of authorities. It seems, however, to have been referred to, without disapproval, in *Marsh* v. *Ellsworth*, 50 N. Y. 309 (1872), in which it is said: "The case (*White* v. *Carroll*) shows that the Court held that the answer given to the question put to the defendant as a witness before the surrogate, was not material and pertinent to the inquiry, and further held it privileged if the defendant when he gave it in good faith believed it was."

In *Calkins* v. *Sumner*, 13 Wisc. 193 (1860), a judgment was allowed to be entered against the defendant witness in the lower Court, but was reversed on appeal. The true rule, it is said, in regard to a witness's liability to an action for what he may say pending his examination before a judicial tribunal is that he is not answerable in damages for any statements he may make, which are responsive to questions put to him and which are not objected to and ruled out by the Court, or concerning the impertinency or impropriety of which he receives no advice from the Court. If what is said or written be pertinent and material to the cause or subject-matter of inquiry, the speaker or writer is not liable to an action, however much he may be actuated by hatred or ill-will. It is one of the many instances where the claims of the individual must yield to the dictates of public policy.

In *Lawson* v. *Hicks*, 38 Ala. 279 (1862), an action was brought against the defendant on account of slanderous interrogatories filed by him in a case to which he was a party; and while the opinion of the Court does not specifically mention witnesses, they seem to be included in the term

parties. "To the catalogue of absolutely privileged communications belong all words spoken or written by the Court, the parties, or their counsel, in the due course of judicial proceedings, which may be relevant. The relevancy or pertinency of the calumnious matter is indispensable to its perfect and absolute freedom from all actionable quality. The law designs, in the adoption of the principle above stated, to relieve those participating in the proceedings of Courts of justice from the restraint which might result from the apprehension of lawsuits. The accomplishment of that object does not require that the privilege should be extended further than to relevant communications. A further extension would license malignity—to pervert judicial proceedings to the accomplishment of its wicked purposes. The avoidance of such a consequence is scarcely less important than the guarding of the unembarrassed freedom of judicial investigation." The latest American case, excepting *Hunckel* v. *Voneiff*, is *Shodden* v. *McElwee*, Supr. Ct. Tenn., Nov. 1887, in which the defendant, on the witness-stand, charged the plaintiff with the theft of his horse. "The act of testifying as a witness," says the Court, "must be either in the exercise of a right or the performance of a duty, and in either case the act must be performed in good faith. If he avails himself of his position as a witness to maliciously answer with a knowledge that such answer is not pertinent or relevant, the law withdraws the protection it would otherwise have afforded him. * * * We fully recognize the importance to a due administration of justice, of upholding the privilege accorded parties to write and speak freely in judicial proceedings; but in so doing, we must not lose sight of the fact that it concerns the peace of society that the good name and repute of the citizen shall not be exposed to the malice of individuals, who, under the supposed protection of absolute privilege, make use of the witness-box to volunteer defamatory matter in utterances not pertinent. To hold such persons responsible in damages cannot fairly be said to hamper the administration of justice. The privilege of a witness is great, but it must not be mistaken for unbridled license."

To the above cases several may be added to the same effect, but not so satisfactory in discussion or citation: *Smith* v. *Howard*, 28 Iowa, 51 (1869); *Morgan* v. *Booth*, 13 Bush (Ky.), 480 (1877); *Lea* v. *White*, 4 Sneed (Tenn.), 111 (1856); *Barnes* v. *McCrate*, 32 Me. 442 (1851); *Wyatt* v. *Buell*, 47 Cal. 624 (1874). There are still other cases, commonly cited as authorities by the text-book writers, which do not, in reality, touch the question at issue, and are of no value whatever in the discussion: *Briggs* v. *Byrd*, 12 Iredell (N. Ca.), 377 (1851); *Goslin* v. *Cannon*, 1 Harr. (Del.) 3 (1832); *Liles* v. *Gaster*, 42 Ohio St. 631 (1885); *Hill* v. *Niles*, 9 N. H. 9 (1837); *Verner* v. *Verner*, 64 Miss. 321 (1886); *Hutchinson* v. *Lewis*, 75 Ind. 55 (1881), and many more.

In those jurisdictions where the question is as yet unsettled the Courts will no doubt be guided, in the conflict of authority, by their views regarding the requirements of public policy. The Maryland Court in *Hunckel* v. *Voneiff* says, that being at liberty to settle the law for Maryland according to its best judgment it is convinced, after consideration, that "the privilege of a witness should be as absolute as it has been decided to be by the English authorities."

EDGAR G. MILLER, JR.
Baltimore.

Supreme Court of Alabama.

BUTLER *v.* ELYTON LAND CO. ET AL.

In Alabama, the brother of a deceased intestate bastard by the same mother, is entitled to inherit land of which such intestate dies seised, to the exclusion of the mother.

The law is the same in Ohio, Rhode Island, Vermont and Virginia, but otherwise in Missouri.

Stevenson's Heirs v. *Sullivant*, 18 U. S. (5 Wheat.) 207, 1820, not followed.

BILL in equity by Mary Butler, averring that she was the mother of two illegitimate sons, one of whom had died, intestate, unmarried and without issue, possessed of a contract for the purchase of certain real estate in Alabama, upon which part payment had been made to the Land Company, and a bond for title executed by them to him; that the surviving son had obtained possession of said bond, and, claiming to be the sole heir of his deceased brother, had disposed of the same to Going, one of the defendants; that Going had obtained title from the Land Company, and praying that Going be decreed to hold the land for the use of the complainant, and that the Land Company be decreed to make her a clear title to said land.

A demurrer, that complainant was not heir-at-law of her deceased son, being sustained, appeal was taken to this Court.

W. M. Brooks and *Barnes & Barnes*, for appellant.
Webb & Tillman, for appellees.

SOMERVILLE, J. This case turns on the proper construction of our statute regulating inheritance between bastard children and their mothers and other kindred; the contest here being one, in effect, between the mother and uterine brother of a deceased bastard, who died seised and possessed of the real estate in controversy.

These sections of the Code (1886) read as follows: Sec. 1921. "Every illegitimate child is considered as the heir of his mother, and inherits her estate, in whole or in part, as the case may be, in like manner as if born in lawful wedlock." Sec. 1922. "The mother, or kindred of an illegitimate child, on the part of the mother, are, in default of children of such

illegitimate child, or their descendants, entitled to inherit his estate." The inquiry is whether the mother, Mary Butler, under this statute, takes the property of her deceased illegitimate son, Gus Peteet, to the exclusion of the latter's half-brother, one Butler Whitney, of the blood of the same mother. It is contended for appellant, that the latter section (section 1922) must be construed to mean that, in default of children of an illegitimate child, the mother shall first inherit; and if there be no mother living at the time of descent cast, then the kindred of the illegitimate child on the part of the mother shall be entitled to take his estate, and not otherwise. The appellee, on the contrary, contends that these sections of the Code are not complete within themselves, but are a part of an entire system of statutes on the subject of descents and distributions, and are to be construed *in pari materia* with them. The Judge of the City Court adopted the latter view of the statute, and we fully concur with him in this conclusion.

These sections are clearly not complete within themselves. It is declared that the mother, or kindred on the part of the mother, shall inherit. The word "kindred" means relations by blood, and includes collateral as well as lineal relations. It includes children of an intestate and their descendants, brothers and sisters, nieces and nephews, cousins, uncles and aunts, and other next of kin. How are these numerous kindred to inherit, and which, if any of them, are to be preferred? And what is to be the share of each one's inheritance? Necessarily, these inquiries are to be answered by reference to the statutes of descents and distributions, which form a part of the same chapter and article in the Code that embrace the sections under consideration. Except so far as declared otherwise, the rule of descent for real estate must be governed by section 1915, Code 1886, and of personal property by section 1924, which precisely correspond to sections 2252, 2261, Code 1876, the law in force at the time of the death of the intestate in the year 1883. There is nothing in the statute indicating a purpose to give the mother a priority of right over the other kindred whose rights are preferred by the statute of descents. If this had been the legislative intent,

it was easy of expression, as appears in the New York statute, which declares that if an illegitimate child die intestate, without descendants, the inheritance "shall descend to his mother; if she be dead, it shall descend to the relatives of the intestate on the part of the mother, as if the intestate had been legitimate:" 3 Rev. Stat. N. Y., p. 42, § 14 (1859). This construction is a necessary result from the settled rule that, in construing a doubtful statute, all statutes *in pari materia*, or relating to the same general subject-matter, are to be taken and examined together in order to arrive at the legislative intent. "All acts which relate to the same subject," said Lord MANSFIELD, in *Rex* v. *Loxdale*, 1 Burr. 447, "notwithstanding some of them may be expired, or are not referred to, must be taken to be one system, and construed consistently." We are also authorized to examine, for the same purpose, the original statute from which the present law was first codified in the form it now appears, which is the same as that in the Code of 1852: Code 1852, §§ 1578, 1579. The language of that Code is identical with that of all other subsequent Codes of the State down to the one now in force. The law prior to codification in the present form, as taken from the Act of 1824, reads as follows: Sec. 4. "Bastards shall be capable of inheriting, or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother; and shall also be entitled to a distributive share of the personal estate of any of their kindred on the part of their mother, in like manner as if they had been lawfully begotten of such mother." Sec. 5. "The kindred of any bastard on the part of his mother shall be entitled to the distribution of the personal estate of such bastard, in like manner as if such bastard nad been lawfully begotten of his mother:" Aiken, St. (2d ed.), 1836, p. 129; Clay, Dig. Ala. 1843, pp. 168, 169. This old statute differs in phraseology, but not materially in signification, from the one now embraced in the Code of 1886, brought forward, as we have said, from the Code of 1852. It was intended to remedy the cruel and rigorous policy of the common law in reference to bastards, by which was visited on these unfortunates a stigma which more properly belonged to their parents,

and at the same time to deal with the erring mother in a more liberal spirit of justice as well as of Christian charity. By that law a bastard was *nullius filius* as to the whole question of inheritance. He had no mother or father, no brothers, sisters, or other kindred, no inheritable blood, and hence no capacity to inherit or transmit inheritance save to the heirs of his own body. The supposed origin of this rule has been asserted to be the discouragement of a promiscuous and illicit intercourse between the sexes. It is at least debateable whether precisely the opposite policy, conferring equal rights of inheritance upon legitimate and illegitimate offspring, would not better preserve the high moral duty of chastity between the sexes. This was, to a certain extent, the tendency of the civil and Jewish law, as well as of many other ancient Codes, now everywhere admitted to be more humane and enlightened than the rule of the common law on this subject. The general spirit of modern legislation has accordingly been to sweep away, to a great extent, this unjust and illiberal policy of the English law, and to not only permit bastards to inherit from their mothers, but also, in many instances, to provide for their legitimation by the subsequent marriage of their parents, or by written declaration made for that purpose and duly recorded, and to authorize them to transmit inheritance to kindred of their mother's blood, both collateral and lineal. The laws of Scotland, France, Holland, and Germany all provide that the intermarriage of the parents after the birth of a child shall render such child legitimate—a rule of the canon law, the adoption of which the ecclesiastics urged in vain upon the English parliament in the reign of Henry III. This has long been the law of Alabama; legitimation following from the intermarriage of the reputed parents, and recognition by the father: Aiken, St., p. 129, § 3; Code 1886, §§ 2364–2369.

This construction as to the heritable rights of bastards and their collateral kindred was placed upon the Virginia statute enacted in 1785, and carried into the Code of 1819 of that State. Our old statute, as appears in Aiken's and Clay's Digests, seems to be copied from the Virginia Code. That law was construed by the Virginia Court of Appeals, in *Garland*

v. *Harrison*, 8 Leigh, 368 (decided in 1837); an exhaustive and learned opinion being delivered by three of the five Judges. They all agreed that the purpose of the statute was to confer on bastards, not only the capacity to inherit from their mothers, just as they would do were they legitimate children, but also the power to transmit inheritance to their maternal kindred, both collateral and lineal, as if they had been born in lawful wedlock. The object of the statute, said Judge PARKER, "was to make bastards *quasi* legitimate on the maternal side; to give the bastard a mother and maternal kindred; and to make them heritable from each other, in the order prescribed by the law of descents, as if the bastard had been lawfully begotten of such mother. It places this line, in respect to inheritance, precisely in the situation it would be in if one born in lawful wedlock should die leaving no parental kindred." Judge BROCKENBROUGH said: "A bastard may inherit on the part of his mother, in like manner as if he were the legitimate son of his mother. He may, therefore, inherit from his mother, or from his maternal grandparents, in the direct line, or from his maternal uncle and aunt, or great-uncles and great-aunts, in the collateral, and a half portion from his legitimate or bastard half-brother, in the same manner that a legitimate son could inherit from his legitimate half-brother." Judge TUCKER construed the statute in like manner, to render a bastard "capable of inheriting from all his kindred on the part of his mother, whoever they might be." The whole Court vigorously repudiated the soundness of the decision of the United States Supreme Court, in the case of *Stevenson's Heirs* v. *Sullivant*, 5 Wheat. 207 (decided in the year 1820), and relied on for authority in this case by appellant's counsel, in which that Court had come to a different conclusion in construing the Virginia statute, holding that it prescribed transmission of inheritance lineally, but not collaterally, on the part of the mother of a bastard; in other words, that it conferred on bastards capacity to inherit by descent immediately or through their mother in the ascending line, and to transmit the same to their line of descendants, in like manner as if they were legitimate, but did not authorize brothers, sisters, or other

collateral kin even on the mother's side to inherit from them. The question came before the Virginia Court again in *Hepburn* v. *Dundas*, 13 Grat. 219, (decided in 1856), and still again, four years later, in *Bennett* v. *Toler*, 15 Id. 588; and the case of *Garland* v. *Harrison*, 8 Leigh, 368, was, after renewed discussion, adhered to and re-affirmed.

The Vermont statute provided that "bastards shall be capable of inheriting and transmitting inheritance, on the part of the mother, as if lawfully begotten of such mother"—the precise language of section 4 of the Alabama law, as cited above from Aiken's and Clay's Digests. It was held in *Town of Burlington* v. *Fosby*, 6 Vt. 83 (decided in 1834), that, under the statutes of descents and distributions, one illegitimate child could inherit from another illegitimate child of the same mother, which is the precise question arising in this case. The Ohio statute is in identical language, and the Supreme Court of that State, in *Lewis* v. *Eutsler*, 4 Ohio St. 354 (decided in 1854), repudiated the construction placed on the Virginia statute by the United States Supreme Court in *Stevenson's Heirs* v. *Sullivant*, *supra*, and followed the Vermont decision, where a like statute, as we have seen, was construed. They, without a scruple, overruled the case of *Little* v. *Lake*, 8 Ohio, 289 (decided in 1838), in which *Stevenson* v. *Sullivant* had been followed. It is observable that in none of these cases is there any reference made to the case of *Garland* v. *Harrison*, *supra*. In *Briggs* v. *Greene*, 10 R. I. 495, however, the authority of the Virginia case is expressly adopted in construing a similar statute in Vermont, and that of the United States Supreme Court in *Stevenson* v. *Sullivant* repudiated. It was accordingly held, under a statute precisely like the one in Virginia and the former one in Alabama, that bastard children of the same mother are capable of transmitting inheritance on the part of the mother; and when a bastard dies intestate, leaving a bastard sister by the same mother, her estate will pass to that sister. Opposed to this view is the case of *Bent* v. *St. Vrain*, 30 Mo. 268 (decided in 1860), which follows the United States Supreme Court, without noticing the Virginia decisions; and *Remmington* v. *Lewis*, 8 B. Mon. 606 (decided in 1848), which omits to notice any of the foregoing cases.

We adopt the view of the Virginia Court as being more in accordance with the principles of justice and the enlightened and liberal policy of modern legislation on this subject: *Simmons* v. *Bull*, 21 Ala. 501 and note to same, 56 Am. Dec. 263; Schouler, Dom. Rel. § 381; 2 Kent Com. *208–*214. "Our law of descents," as said by Judge TUCKER, in *Garland* v. *Harrison*, *supra*, "was formed in no small degree upon the human affections; the legislature very justly conceiving that the object of a law of descent was to supply the want of a will, and that it should, therefore, conform in every case, as nearly as might be, to the probable current of those affections which would have given direction to the provisions of such will. Under the influence of these opinions," he adds, "they legislated in reference to bastards." An English Judge long ago said, in harmony with the same idea: "The statute of distributions makes such a will for the intestate as a father, free from the partiality of affections, would himself make; and this," he said, "I call a parliamentary will:" *Edwards* v. *Freeman*, 2 P. Wms. 443. We accordingly hold that, under our present statute of descents and distributions, the brother of the deceased intestate bastard by the same mother is entitled to inherit land of which such intestate dies seised, to the exclusion of the mother. The Chancellor so held; and his decree, sustaining the demurrers to complainant's bill, is affirmed.

At common law a bastard had no heritable blood; in consequence, he was incapable of heirship: Litt. § 188; Doct. & Student Dial., 1 Ch. 7, and could have no heirs save those of his body: Co. Litt. 3 b. This utter disqualification to inherit has been fully recognized in the United States: *Flintham* v. *Holder*, 1 Dev. Eq. (N. C.) 345; *Stover* v. *Boswell*, 3 Dana, 232; *Cooley* v. *Dewey*, 4 Pick. 92; *Bent's Administrator* v. *St. Vrain*, 30 Mo. 268; *Blacklaws* v. *Milne*, 82 Ill. 505; probably in all of them, except Connecticut, which at a very early day declared that the English common law as to bastards did not prevail within her boundaries, but by the common law of Connecticut natural children of the same mother might be heirs to each other: *Brown* v. *Dye*, 2 Root, 280; this was followed by the case of *Heath* v. *White*, 5 Conn. 228, wherein it was held that a bastard could inherit from his mother, and in *Dickinson's Appeal*, 42 Conn. 491, a bastard was recognized as possessing heritable blood, both lineal and collateral.

The hardship of the bastard's case entailed upon him by the sins of his parents attracted the attention of the Legislature, and remedies differing, rather in degree than in kind, have been enacted in the various States. It is proposed in this note to consider

the legislation upon the general subject of inheritance by and from bastards.

As was most natural, the legislation first took the direction of securing to the child the right of inheritance from his mother, and this right is now recognized in all the States, but the consequences flowing from that recognition differ according to the terms of the statutes containing it.

In Florida, Dig. (McClell.) Ch. 92, § 8; Indiana, R. S. (1881) § 2474; Kentucky, R. S. (Bul. & Fel. 1881) Ch. 31, § 5; Missouri, R. S. (1879) § 2169; Rhode Island, Pub. St. (1882) Ch. 187, § 7; *Briggs* v. *Greene*, 10 R. I. 495; Virginia, Code (1887) §§ 2552, 2553; *Bennet* v. *Tolen*, 15 Gratt. 588; *Hepburn* v. *Dundas*, 13 Id. 219; *Garland* v. *Harrison*, 8 Leigh, 368; West Virginia, R. S. (1879) Ch. 66, § 5; it is provided (and formerly was provided in Ohio), that bastards may inherit or transmit inheritance on the part of their mother as though legitimate. Such statutes do not create heritable blood generally between the bastard and his natural collateral relatives, but limit him to inheritance in the cases of lineal ascent or descent: *Allen* v. *Ramsey's Heirs*, 1 Metc. (Ky.) 635; *Scroggin* v. *Allan*, 2 Dana, 363; *Remmington* v. *Lewis*, 8 B. Mon. 606; *Bent's Adm'r* v. *St. Vrain*, 36 Mo. 268; and this conclusion has been rested on the distinction taken between the expressions *ex parte materna* and *ex linea materna*, it being held that the former implied lineal descendants: *Little* v. *Lake*, 8 Ohio, 289. This distinction was questioned in *Lewis* v. *Eutsley*, 4 Ohio, St. 354, but was subsequently upheld in *Gibson* v. *McNeeley*, 11 Id. 131; and *Hawkins* v. *Jones*, 19 Id. 22. The conclusion is also supported by a decision of the Supreme Court of Vermont in *Burlington* v. *Fosby*, 6 Vt. 83. That Court has held, that under the statute of the State one illegitimate child could inherit from another of the same mother. In *Bacon* v. *McBride*, 32 Id. 585, it was asked to hold that such child could inherit from a legitimate child of the same mother, but REDFIELD, C. J., said, "This (the expression on the part of the mother), strictly extends no further than to inheritance between the mother and child. It was by construction, in the case of *Burlington* v. *Fosby*, extended to create the relation of brother and sister between illegitimate children of the same mother. We are now asked to extend it so as to create the same relation between illegitimate children and legitimate children of the same mother. This is certainly going a very great way beyond the statute. It will enable the mother, by illicit means, to supply at will heirs to the property of the legitimate children, who may thus deprive them, in case of the decease of their brother and sister, of the enjoyment of the property claimed from their own father. This is certainly something not contemplated by the Court in the case of *Burlington* v. *Fosby*, and entirely beyond the purview of the statute. In fact the decision in *Burlington* v. *Fosby* went beyond the statute."

In Virginia, the inheritance of the bastard has been held to be as by a person of the half blood, a half portion only being taken: *Garland* v. *Harrison*, 8 Leigh, 368; and this was formerly the case in Mississippi. See Act Feb. 23, 1846, § 4, p. 231.

In some States the heirship of the bastard to his mother is recognized, but he is expressly debarred from the right of representation, either collateral or lineal: California Civ. Code, § 6387; Michigan R. S. (1882) § 5773 *a*; Maine R. S. Ch. 75, § 3; Minnesota, Gen. L. (1878), Ch. 46, § 5;

Nebraska Comp. St. (1885), Ch. 23, § 31; Nevada, Comp. Laws (1873), § 795. But such a provision does not necessarily exclude inheritance between illegitimates of the same mother. See *Estate of Magee*, 63 Cal. 414. The provisions in the other States are not so readily grasped.

In Alabama, a bastard inherits from his mother: Code (1886), § 1921; *Lingen* v. *Lingen*, 45 Ala. 410.

In Arkansas, he may inherit and transmit inheritance from and to any and all collaterals, legitimate or illegitimate: Dig. (1884), § 2524; *Gregley* v. *Jackson*, 38 Ark. 487.

In Colorado, the law is the same as in Alabama: Colorado R. S. (1883), § 1048.

In Georgia, bastards inherit from their mother irrespective of the existence of legitimate children, and from each other; and representation amongst collaterals will extend to illegitimates: Code (1882), § 1800.

In Illinois, the common law continued in force until 1845, when an Act was passed allowing a bastard to inherit from his mother if she remained unmarried: Rev. Stat. 547, § 53; by Act of Feb. 12, 1853, Laws, p. 255; and see *Miller* v. *Williams*, 66 Ill. 91; *Blacklaws* v. *Milne*, 82 Id. 505; he was enabled, in addition, to transmit his property by inheritance to his mother and her children. In 1872, the requirement that the mother should remain unmarried was swept away and the illegitimate is now heir of any person from whom his mother, if living, could have taken: R. S. (1883), Ch. 39, Art. 2, § 2. In the case of *Baless* v. *Elder*, 118 Ill. 436, the facts were as follows: A woman having an illegitimate son, married and had legitimate children, the natural child married and died leaving children; the mother then died and afterwards one of her legitimate children died without leaving issue; it was held that the children of the natural child could inherit as representating their father and his mother.

In Indiana, representation is recognized: R. S. (1881), § 2474.

In Iowa, illegitimates take from their mother: R. S. § 2441; *Crane* v. *Crane*, 31 Iowa, 296; and represent her: *McGuire* v. *Brown*, 41 Id. 650.

In Louisiana, bastards, if acknowledged, succeed to their mother, if she leave no lawful issue; if she leave such issue, alimony only is given to the illegitimates: Code, § 918; they cannot take by representation from the legitimate relatives of their mother: Id. § 921; but may inherit from each other on proof of common maternity; Id. § 923; *Dupré* v. *Caruthers*, 6 La. Ann. 156.

In Maryland, illegitimates of the same mother take from each other: Rev. Code (1873), art. 47, § 30.

In Massachusetts, under R. S. Ch. 61, § 2, and Gen. St. Ch. 91, § 5, while a bastard was declared heir to his mother, he could not take as her representative, either from her lineal or collateral relatives: *Pratt* v. *Atwood*, 108 Mass. 40; *Kent* v. *Barker*, 2 Gray, 535; *Curtis* v. *Hewens*, 11 Metc. 294; but now it is provided by Pub. Stat. (1882) Ch. 125, § 3, that an illegitimate child shall be heir of his motherand of any natural ancestor,and that the lawful issue of an illegitimate shall represent him. This Act gives lineal representation, but does not render the bastard his mother's representative as to collateral inheritance: *Haraden* v. *Larrabee*, 113 Mass. 430.

In New Hampshire, the law is the same as in Alabama and Colorado: Gen. St. (1878) Ch. 203, §§ 4, 5.

In New York, in default of legitimate children, bastards are declared heirs to their mother as if legitimate: R. S., p. 2214; Act 1885, Ch. 547.

The same rule prevails in New Jersey: Stew. Dig. Orphans' Ct., pl. 147 (p. 785).

In North Carolina, by the Act of 1799, bastards were given the right of inheritance from their mother where she had no lawful issue: *Sawyer* v. *Sawyer*, 6 Ired. L. 407; illegitimates of the same mother were allowed to take from each other and legitimates might take with them as coheirs, but the bastard could not inherit from the legitimate children: *Den on dem. Ehringhaus* v. *Cartwright*, 8 Id. 39; this rule was modified under Bat. Rev. Ch. 36, rule 11, only so far as to permit a representation of brothers and sisters: *McBryde* v. *Patterson*, 78 N. C. 412; *Powers* v. *Kite*, 83 Id. 156; and the law governing realty is still the same: Code (1883), § 1281, Rules 9, 10; as to personalty, however, the bastard will take with the legitimate children of the same mother share and share alike: Code, § 1486.

In Mississippi, bastards inherit from their mother and brother's children, and her kindred and their children and descendants from brothers and sisters of their father and mother, whether legitimate or illegitimate, and from their grandparents, but not from any ancestor or collateral kindred, if there be legitimate heirs in the same degree: Rev. Code (1880), § 1275.

In Ohio, bastards inherit from and represent their mothers: R. L. (1884) § 4174.

In Pennsylvania, under the Act of April 27, 1855, § 3, P. L. 368, which provides that illegitimates and their mother "shall respectively have capacity to take or inherit from each other personal estate as next of kin, and real estate as heirs in fee simple, and as respects said real or personal estate, to transmit the same according to the laws of this State," illegitimates shall share equally with legitimates in the estate of their common mother: *Opdyke's Appeal*, 49 Pa. St. 373, but are not legitimated: *Grubb's Appeal*, 58 Id. 55. The Act is not retrospective and does not enable a bastard dying before his mother, to transmit a right from her to his descendants: *Steckel's Appeal*, 64 Id. 493. The Act of June 5, 1883, P. L. 88, provides that "illegitimate children born of the same mother shall have capacity to take from each other personal property as next of kin, and real estate as heirs in fee simple in the same manner as children born in lawful wedlock." This Act does not seem to have been interpreted by the Supreme Court. In *Herbein's Estate*, 2 Chest. Co. Rep. 449, the Orphans' Court held that it did not confer upon the issue of a deceased illegitimate the right to take as his representative from his brothers and sisters.

In Tennessee, bastards were by the Act of 1819, ch. 13, § 1, empowered to inherit from their mother where there were no legitimate children, but their right was strictly limited to the terms of the Act: *Brown* v. *Kerby*, 9 Humph. 461; the right was afterwards so extended as to allow illegitimate brothers and sisters to inherit from each other: Act of 1851, Ch. 39; and this right was extended to legitimate children of the same mother: *Riley* v. *Byrd*, 3 Head, 20; *Webb* v. *Webb*, Id. 68; but under the Act, while legitimate children could inherit from illegitimates of the same mother, the illegitimates could not inherit from the legitimates: *Woodward* v. *Duncan*, 1 Coldw. 563. This inequality was remedied by an Act passed in 1866-67; see Code (M. & V. 1884), § 3274; *Scoggins* v. *Barnes*, 8 Baxt. 560.

In Texas, a bastard may inherit

from and through his mother, and transmit the inheritance: R. S. (1879) Tit. 33, § 1657.

The legislatures have been much more chary with regard to permitting a bastard to inherit from his father than they have been with regard to a maternal inheritance, and for reasons which seem well founded in public policy. In some States, however, a fairly liberal policy in this respect has prevailed.

In California, a bastard becomes heir of the person who by a writing, in presence of a witness, declares that he is his father: Civil Code, § 6587; but the writing must be one executed for the express purpose of changing the status of the child: *Pina* v. *Peck*, 31 Cal. 359; *Estate of Sandford*, 4 Id. 12.

In Iowa, R. S. (1884) § 2466, and Kansas, Comp. St. (1885) § 2261, a bastard acknowledged by his father, or whose paternity is proved in his father's lifetime, may take as his heir. The acknowledgment must be in writing, or notorious, but if in writing it need not be, as in California, formal, and it has been held that a sufficient acknowledgment may be found in a series of letters written by a father to and about his natural son at school: *Crane* v. *Crane*, 31 Iowa, 296. The acknowledgment does not legitimatize the child: *Brown* v. *Belmarde*, 3 Kan. 41.

In Indiana, an illegitimate child who has been acknowledged, will take as heir of his father, who dies without legitimate heirs resident in the United States, or legitimate children, irrespective of residence: R. S. (1881) § 2475. In the fact of acknowledgment the testimony of the mother must be excluded: Id.; and the word "heirs" in the statute is not confined to lineal heirs, but embraces collaterals, so that brothers and sisters resident in the United States will exclude the illegitimate child of the decedent: *Borroughs* v. *Adams*, 78 Ind. 160.

In Louisiana, an acknowledged bastard may take from his father who leaves no descendants, ascendants, or collateral relatives: Code, § 918, or a widow, § 924; but the bastard obtains no right of representation by the acknowledgment: § 921; and an unacknowledged bastard cannot take, although his paternity may have been judicially ascertained: *Dupre* v. *Caruthers*, 6 La. Ann. 186.

In some States, the subsequent marriage of the parents of a bastard has been allowed to confer an heritable quality upon the ante-nuptial progeny. It is well known that by the Roman law the marriage of the parents rendered such offspring legitimate, and that it was to a proposition to introduce the same rule into the English law in thereign of Henry III., that the famous answer, "*Nolumus quod nolint leges Angliæ mutari, quæ hucusque usitatæ sunt et approbatæ,*" was given; although more attention to abstract justice and a little less exaggeration of national pride might well have dictated another answer; still, in this country, following in the footsteps of the example set in England, the policy of refusing legitimation to the child on subsequent marriage prevailed for a very long time, indeed until very recently. The example of breaking away from the hard English rule seems to have been set by Virginia, whose legislation about the time of and subsequent to the Revolution showed, by its decided tendency in the direction of justice and freedom, the influence of those great men, profound jurists and statesmen, who then led her, and who in 1785 passed an Act rendering legitimate ante-nuptial children. At present, in the following States the subsequent marriage of the parents of a bastard and his recognition by them,

renders him legitimate: Alabama, Code (1876) § 2742; Arkansas, Dig. (1884) § 2525; California, Civil Code. § 6387; Georgia, Code (1882) § 1786; Illinois, R. S. (1883) Ch. 39, § 3; Indiana, R. S. (1881) § 2476; Kentucky, Gen. Stat. (1881) Ch. 31, § 6; Maryland, R. C. (1878) Art. 47, § 29; Massachusetts, Pub. St. (1882) Ch. 125, § 5; Michigan, Rev. Stat. (1882) § 5775, *a*; Mississippi, R. C. (1880) § 1275; Missouri, R. S. (1879) § 2170; New Hampshire, Gen. L. (1878) Ch. 181, § 15; Ohio, R. S. (1884) § 4175; Oregon, Gen. L. (1872) Miscell. Ch. 10, Tit. 3, § 5; Pennsylvania, Act May 14, 1857, § 1, P. L. 507; Texas, R. S. (1879) Art. 1656; Vermont, Rev. L. (1880) § 2233; Virginia, Code (1887) § 2553; West Virginia, R. S. (1879) Ch. 66, § 6.

To cause legitimation there must be recognition as well as marriage; in Michigan, however, marriage only is mentioned in the Act, so that there, perhaps, proof of parentage other than by recognition may be sufficient.

It is not necessary that the process of legitimation be complete in the lifetime of the legitimatized person; it may be completed after his death, provided no vested rights are impaired thereby. This position is illustrated by the case of *Ash* v. *Way's Administrator*, 2 Gratt. 203. In that case, R. Way was the father of an illegitimate child, Mary Ann, whom in his lifetime and at his death he recognized as his own; Mary Ann married Ash and died, leaving a son; after Mary Ann's death, Way married her mother. On the death of Way, the son of Mary Ann claimed to be his legitimate descendant, and a demurrer to his claim was overruled. Acts of the character of those above enumerated may be retrospective and retroactive. The Virginia Act was passed in 1785, an illegitimate child born in 1775, and acknowledged in 1776, was held legitimate within its provisions in *Sleigh* v. *Strider*, 5 Cal. 439. In *Stevenson* v. *Sullivant*, 5 Wheat. 207, the Supreme Court of the United States, on the authority of a dictum of ROANE, J., in *Rice* v. *Efford*, 3 H. & M. 228, held the Act not retroactive, but *Stevenson* v. *Sullivant* was denied by the Court of Appeals of Virginia, in *Garland* v. *Harrison*, 8 Leigh, 368. The retroaction may render legitimate the issue of a deceased person: *Gregley* v. *Jackson*, 38 Ark. 487, and legitimation itself cannot operate to divest vested rights, as for example, to cause a redistribution of property which has already descended to legitimate children: *Killam* v. *Killam*, 39 Pa. St. 120; *McGunnigle* v. *McKee*, 77 Id. 81; or to deprive the State of a vested right to the collateral inheritance tax: *Galbraith* v. *Commonwealth*, 14 Pa. St. 258.

In some States, there are statutory provisions for legitimation upon application by the father to the proper Court; Georgia, Code (1882) § 1787; North Carolina, Code (1883) Ch. 5, § 39; Tennessee, Code (1884) §§ 4381–87; Mississippi, Code, § 1496; in North Carolina, Tennessee, and Georgia there is a requirement that the father must have been unmarried at the time of the child's birth. Legitimation may be by acknowledgment in writing, in Alabama, Code § 2365, and Michigan, Rev. Stat. (1882) § 5775 *a*.

Western States have not gone to the length of declaring a bastard legitimate upon the subsequent marriage of his parents, but have provided for his inheritance in such a contingency; thus, in Colorado, R. S. (1883) § 1045; Maine, R. S. (1883) Ch. 75, § 3, as to children born after March 24, 1864; in Minnesota, Gen. Laws (1878) Ch. 47, § 5; Nebraska, R. S. Ch. 23, § 31; Nevada, R. S.

§ 795; Wisconsin, R. S. § 2274; there is the additional requirements that the parents shall not only marry but have other children before the death of the bastard, and this seems to be the rule with reference to children born before March 24, 1864, in Maine. These statutes, while they do not technically legitimatize the child, seem to confer all the privileges of a legitimate heir, including representation; but in Nevada, Laws, 1885, Ch. 24, § 9, and California, Civil Code, § 5230, there may be a species of legitimation by matter *in pais*, when the father of an illegitimate publicly acknowledges the child as his own and receives it into his family, with the assent of his wife, if he be married, and otherwise treat it as a legitimate.

In certain States, the issue of a marriage deemed null in law is held legitimate. Arkansas, Dig. § 2526; Missouri, R. S. § 2171; Nebraska, Comp. St. Ch. 23, § 31; Nevada, R. S. § 795; Ohio, R. S. § 4175; Texas, R. S. Art. 1656; Virginia, Code (1887) § 2553; West Virginia, R. S. Ch. 66, § 7; Wisconsin, R. S. § 2274.

In Ohio, an attempt was made to confine the words of the statute "deemed null in law," to voidable marriages, but the Court before which the question came refused to adopt such restricted interpretation, and held that the issue of a marriage contracted by a man who had a wife still living was legitimate within the terms of the statute. *Wright* v. *Lore*, 12 Ohio St. 619, and see *Stones* v. *Keeling*, 5 Cal. 143. In Missouri the effect of the statute has been held to allow a guilty father to inherit from his child: *Dyer* v. *Brannock*, 66 Mo. 391.

In California, the statutory provision referred to is, that the issue of any marriage, annulled on the ground that a former husband or wife was living, or of insanity, begotten before judgment, is legitimate: Civ. Code, § 5084; and in Louisiana there is a provision for the legitimation of the offspring of null marriages, but it appears to be confined to cases wherein the parties or one of them has acted in good faith, as where a woman marries ignorantly an already married man: Code, Arts. 119, 120; *Abston* v. *Abston*, 15 La. Ann. 137.

The inheritance by the parents of bastards has also been the subject of legislation, and in all the States the mother may now take by inheritance from her illegitimate child. In Georgia Code, § 1800: Illinois R. S. Ch. 39, § 2; Nevada, R. S. § 796; Oregon, Gen. Laws, Miscell. Ch. 10, § 5, she is postponed to the widow or surviving husband of the illegitimate; in Maine, she shares with the widow or husband: R. S. Ch. 75, § 4; in Louisiana, she takes to the exclusion of brothers and sisters: Code, § 922; *Nolasco* v. *Lurty*, 13 La. Ann. 100; in Colorado, R. S. § 1048, and Illinois and Georgia, *supra*, she shares with them, taking as her part one-half of the inheritance; in the other States the mother of a bastard and her kindred inherit from him as the mother and kindred of a legitimate child would from him so far as the mother's side is concerned; Alabama, Code, § 1922; Arkansas, Dig. § 2524; California, Civil Code, § 6388; Delaware, 2 Laws, Ch. 243; Florida, McClell. Dig. Ch. 92, § 8; Indiana, R. S. § 2477; Iowa, R. S. § 2465; Kansas, Comp. St. Ch. 33, § 22; Kentucky, Gen. St. Ch. 31, § 5; Maryland, R. C. Ch. 47, § 30; Massachusetts, Pub. St. Ch. 125, § 4; Michigan, Rev. St. § 5774 *a*; Minnesota, Gen. Laws, Ch. 46, § 6; Missouri, R. S. § 2169; Nebraska, R. S. Ch. 23, § 32; New Hampshire, R. S. Ch. 203, § 4; New York, R. S. Pt. 2, Ch. 2, § 14; New Jersey,

R. S. (Stewart), p. 1299, pl. 1; North Carolina, Code, § 1281; Ohio, R. S. § 4174; Oregon, R. S. Ch. 10, § 5; Pennsylvania, Purd. Dig. (1872), p. 934, pl. 40; Rhode Island, Pub. St. Ch. 187, § 7; Tennessee, Stat. 1885, Ch. 34; Texas, R. S. § 1657; Vermont, R. S. § 2232; Virginia, Code, § 2552; West Virginia, Act 1882, Ch. 94, § 5; Wisconsin, R. S. § 2273.

Inheritance by the father of the bastard appears to be permitted in but few States. In Kansas and Iowa, the father of an acknowledged bastard, where the acknowledgment is mutual, may take from him; in the latter State, he will, under such circumstances, have the same rights of heirship as the mother of the illegitimate, R. S. Iowa, § 2467: but in Kansas, he will be postponed to the mother and her issue: Dig. § 2262; in Louisiana, the father who has acknowledged a bastard may inherit from him, and if both the mother and father have acknowledged him, they will share equally in his estate: Code, § 922. HENRY BUDD.

Supreme Court of the United States.

ASHER v. STATE OF TEXAS.

The Texas Act, May 4, 1882, imposing a tax on every commercial traveller, drummer, salesman, or solicitor of trade by sample or otherwise, is repugnant to the constitutional power of Congress (to regulate commerce among the several States), and is void.

It is strenuously contended by the Court of Appeals of Texas, in this case, that the decision of this Court, in *Robbins* v. *Taxing District*, is contrary to sound principles of constitutional construction; as to the constitutional principles involved, the views of this Court are quite fully and carefully expressed in the *Robbins* case.

Local burdens imposed upon interstate commerce, by way of taxing an occupation directly concerned therein, as by levying a general license tax on telegraph companies, are unconstitutional.

When a decision of this Court is not in harmony with previous decisions, it has the effect of overruling such prior ones as it is in conflict with, whether mentioned and commented on, or not.

Ex parte Asher, *ante*, p. 77, reversed, and *Robbins* v. *Taxing District*, 120 U. S. 489, and *Leloup* v. *Mobile*, 127 Id. 640, affirmed.

Opinion by BRADLEY, J., October 29, 1888, in full in 128 U. S. 000.